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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-929

RSR CORPORATION,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner RSR Corporation submits this brief in response to the Federal Trade Commission's brief in opposition to RSR's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on July 30, 1979.

1. The Ninth Circuit Misconstrued This Court's Controlling Decisions on the Determination of the Relevant Geographic Market.

Despite this Court's unequivocal statement in *United States* v. *Marine Bancorporation*, 418 U.S. 602, 621 (1974), that the relevant market is "the area in which the goods or services at issue are marketed to a significant degree by the acquired firm," the Commission insists that *Marine Bancorporation* is limited to "the localized banking indus-

try" (FTC Br. 14). Indeed, the Commission denies that the *Marine Bancorporation* test was meant to be "a universal standard for delineating geographical markets" (*Id.*). But as noted in the Petition (p. 9), this Court made it perfectly clear in *Marine Bancorporation* that it was restating "the traditional view"—adopted in cases having nothing to do with the banking industry—that the geographic market "means the area in which the relevant product is in fact marketed by the acquired firm." 418 U.S. at 621 n.20. Furthermore, the Commission completely ignores this Court's statement in *United States* v. *Connecticut National Bank,* 418 U.S. 656, 667 (1974), that the relevant geographic market is the area in which the acquired firm is in "significant, direct competition" with other firms. No amount of discussion of "nation-wide pricing interdependence" (FTC Br. 11) can establish the "significant, direct competition" required by *Connecticut National Bank.* Unless it is rejected by this Court, the Commission's position threatens to undermine the precedential significance of *Marine Bancorporation* and *Connecticut National Bank.*

Not satisfied with its unwarranted attempt to limit the reach of these precedents, the Commission asserts that, in any event, its determination that the merging firms were "actual competitors in a national market" is "supported by substantial evidence" (FTC Br. 14). Yet elsewhere the Commission stresses its finding that "but for the merger the two firms would have been direct competitors in the Northeast" (FTC Br. 7) and notes the Court of Appeals' holding that there was "preexisting competition between RSR and Quemetco in the Midwest and imminent competition between them in the Northeast when the merger occurred" (FTC Br. 8-9)—a square concession that the evidence proves separate regional markets, rather than a single national market.

The Commission argues that RSR's statistics "tell only part of the story" because "they fail to include the new Wallkill plant" to be built by Quemetco (FTC Br. 11). But the fact is that, *even if the Wallkill, New York plant is taken into consideration,* Quemetco still would not compete with RSR in significant areas of the country. Whatever the effect of Quemetco's Wallkill, New York plant might have been on RSR's sales in the Northeast, the fact remains that approximately 80% of Quemetco's 1971-72 lead production was shipped to the states of California, Oregon and Washington (F. 191-93, 49a-51a)[1]—*states to which RSR did not ship at all* (F. 204, 55a). Similarly, 45-50% of RSR's shipments were made to Texas, Oklahoma and Louisiana (F. 199-200, 53a-55a)—states to which Quemetco made no shipments (F. 191, 50a n.5). As we stressed in our Petition (pp. 5, 8), the Commission has conceded that RSR did not ship even a pound of lead to the West Coast during the period prior to the merger. This fact—which the Commission totally disregards in its brief—conclusively demonstrates the inappropriateness of the Commission's order requiring RSR to divest Quemetco's plant in City of Industry, California.

Even if, as the Commission alleges, 6% of the output of RSR's Dallas, Texas plant was shipped more than 1500 miles to customers on the East Coast (FTC Br. 5), these inconsequential shipments that were made in rare situations to supply specialty products (F. 212, 57a-58a) do not represent the "significant, direct competition" mandated by this Court in *Connecticut National Bank.* Moreover, even the Commission does not suggest that plants in the Northeast

[1] While the Commission believed that these figures (which included intra-corporate transfers amounting to 20-30% of the plants' output) were not dispositive as to the calculation of average shipping distances (158a-161a), the Commission nowhere questioned the validity of these figures when used to show the quantity of lead Quemetco sold in each state.

or Midwest ship lead to California. And California—a state accounting for approximately 9% of the total U.S. lead consumption (F. 198, 52a n.6)—can hardly be considered a state which "generate[s] little or no demand for secondary lead" (FTC Br. 12).

In sum, far from establishing that RSR and Quemetco were "actual competitors" in a "national market," the uncontradicted evidence shows that the West Coast is a market isolated from the rest of the country in which RSR did not—and could not practicably—compete. The Ninth Circuit's decision, which found a violation of Section 7 in a "national market," therefore does not comport with the controlling standards for determination of the relevant market established by this Court in *Marine Bancorporation* and *Connecticut National Bank*. The finding of the relevant market included areas (at least the West Coast and Texas-Louisiana-Oklahoma) in which the relevant product was not marketed by one of the merging firms—as required by *Marine Bancorporation*—and where the firms were not in "significant, direct competition"—as required by *Connecticut National Bank*.

2. The Ninth Circuit Applied an Improper Legal Standard in Determining Whether RSR's Acquisition of Quemetco Was Likely to Have a Substantial Anticompetitive Effect.

The Commission's brief demonstrates the urgent need for this Court to clarify the proper impact of Section 7 of the Clayton Act on horizontal mergers.[2] This Court's *General Dynamics* decision should have made clear that "statistics concerning market share and concentration . . . [are] not conclusive indicators of anticompetitive effects." *United*

[2] This assumes that the acquisition was in fact horizontal—a conclusion which can be reached only if the Commission's improper market definition is sustained.

States v. *General Dynamics Corp.*, 415 U.S. 486, 498 (1974). Nonetheless, the Commission does not deny that it and the Court of Appeals "gave 'decisive weight' to market share and concentration data for the years prior to the acquisition" (FTC Br. 14). Rather, it argues that petitioner has "misconstrued" this Court's *General Dynamics* decision and contends that *General Dynamics* "reaffirmed" the reliance of *Philadelphia National Bank* on market shares and increase in concentration as decisive (FTC Br. 15).[3] The *General Dynamics* case, the Commission believes, is limited to coal industry mergers and is not to be generally applied to acquisitions of other businesses. This case affords an important opportunity to make clear that this Court's *General Dynamics* decision is not a special rule but rather a decision of general applicability which requires "a further examination of the particular market—its structure, history and probable future— . . . for judging the probable anticompetitive effect of the merger." 415 U.S. at 498.

The Courts of Appeals for the Seventh and Eighth Circuits have correctly perceived that *General Dynamics* is not a "sport," reflective of the peculiarities of a particular industry. *United States* v. *International Harvester Co.*, 564 F.2d 769, 769-74 (7th Cir. 1977), involving farm machinery (in judging probable anticompetitive effect there must be, in addition to market statistics, an examination of the structure, history and probable future of the particular market); *FTC* v. *National Tea Co.*, 603 F.2d 694, 700 (8th Cir. 1979), involving the grocery business (market share may be an

[3] Significantly, in *General Dynamics* the fact that the merged company had a market share of over 23% in one of the areas claimed to be a relevant market (415 U.S. at 496 n.8) was insufficient to give rise to a conclusive presumption of probable anticompetitive effect. Here, the market share of the merging companies at the time of the merger was even less, amounting to a little over 19% (even if one accepts the Commission's market definitions) (184a).

inaccurate reflection of the merged companies' future competitive effect).

The Ninth Circuit's decision in this case and the Commission's brief in support of that decision take a contrary view, seeking to retreat to the comfortable ground of *Philadelphia National Bank, Pabst* and *Von's Grocery,*[4] where horizontal violations of Section 7 were found on the basis of market shares and concentration alone. As respondent's brief shows, in essence the Commission found, and the Ninth Circuit agreed, that RSR's acquisition of Quemetco violated Section 7 under *Philadelphia National Bank, Pabst* and *Von's* because "the market share and concentration figures were sufficiently high to support a finding of violation" (FTC Br. 9). Both the Ninth Circuit and the Commission have refused to accept the reaffirmance in *General Dynamics* of this Court's direction in *Brown Shoe* that a functional analysis, not simply a statistical summary, must be employed. The Ninth Circuit's decision does not even mention *General Dynamics* in its discussion of "Lessening of Competition" (183a-187a), and the FTC's opinion omits any reference to *General Dynamics* in its discussion of "Anticompetitive Effects" other than to cite it in support of reliance on concentration figures under the authority of *Philadelphia National Bank* (142a).

General Dynamics returned Section 7 jurisprudence to the basic principles set down in *Brown Shoe*—not just for the coal industry, but for all competitors in the American economic system. The decision below—which ignores the return to basic Section 7 principles mandated by *General*

[4] United States v. Philadelphia National Bank, 374 U.S. 321 (1963); United States v. Pabst Brewing Co., 384 U.S. 546 (1966); United States v. Von's Grocery Co., 384 U.S. 270 (1966). As stated by the Commission in its opinion, "concentration figures of the magnitude of those present in this case must give rise to a presumption, or *prima facie* case of illegality" (142a).

Dynamics—should be corrected by this Court before further confusion results in incorrect interpretations of *Brown Shoe* and *General Dynamics*. This case presents an opportunity to make clear once and for all that market share data and concentration statistics are only the starting point in a Section 7 analysis; that the ultimate goal is to assess as accurately as possible the probable future competitive effects of the challenged merger.

It is also important for guidance in future Section 7 cases that this Court correct the Ninth Circuit's erroneous conclusion that, under *General Dynamics,* "post-merger evidence is entitled to only 'extremely limited' weight in refuting charges of anticompetitive effect" (179a). The fact is that *General Dynamics* expressly approved the use of post-acquisition evidence and found it sufficient to prove that the challenged acquisition would not result in anticompetitive effects.

Here, as in *General Dynamics,* there were "fundamental changes in the structure of the market" (415 U.S. at 501) which render statistics as to past market shares and concentration insufficient for assessing future competitive effect. Here, as in *General Dynamics,* the post-merger evidence related to changes in the patterns and structure of the industry which were beyond the control of the acquiring company (415 U.S. at 506). The Ninth Circuit erred in considering this evidence to be of "extremely limited weight." It is likewise error for the FTC to suggest, as it has at page 17 of its brief, that this Court need not review that holding—which the FTC does not even seek to defend on the law.

As this Court emphasized in *General Dynamics,* the most important factor in a Section 7 case is what is likely to happen *in the future.*

CONCLUSION

For all of the reasons discussed above and in our petition for certiorari, a writ of certiorari should be granted, the decision of the Court of Appeals should be reversed and enforcement of the FTC's divestiture order should be denied.

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Respectfully submitted,

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